(1)

Supreme Court, U.S.
FILED

94 857 OCT 11 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1994

KATHLEEN S. WINTHER, for herself
and all others similarly situated,

Petitioner

vs.

CITY OF PORTLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRADLEY P. AVAKIAN
Counsel of Record
Francesconi & Busch, P.C.
835 NE Multnomah, Suite 935
Portland, Oregon 97232
(503) 235-9636
Attorneys for Petitioner

October 10, 1994

99

QUESTIONS PRESENTED FOR REVIEW

1. To resolve a conflict among the circuits, whether the proper test for defining one establishment under the Equal Pay Act is the functional test, or the hybrid test which combines the geographic and functional tests.

2. To resolve a conflict among the circuits, whether the proper test for defining one establishment under the Equal Pay Act is the same for both public and private employers.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

OPINIONS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED . 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT . 14

CONCLUSION 34

APPENDIX 35

TABLE OF AUTHORITIES

CASES

A.H. Phillips Inc. v. Walling, 324 U.S. 490 (1945) . . . 15

AFSCME, AFL-CIO v. County of Nassau, 609 F.2d 695 (D.C. N.Y. 1985) . 19, 27, 30

Alexander v. Univ. of Michigan - Flint, 509 F. Supp. 627 (E.D. Mich. 1980) 22

Bartelt v. Berlitz Sch. of Languages of Am., 698 F.2d 1003 (9th Cir. 1983) . . . 15

Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53 (5th Cir. 1975) 16, 17, 19

EEOC v. Maricopa County Comm. College Dist., 29 FEP Cases 383 (D. Az. 1982) 22

Foster v. Arcata Assoc. Inc., 772 F.2d 1453 (9th Cir. 1985) 20, 21, 31

Gerlach V. Michigan Bell Tel. Co., 448 F.2d 1178 (E.D. Mich. 1978) 15

Grumbine v. United States, 586 F. Supp. 1144 (D.C. Cir. 1984) 18, 19, 25, 27, 29, 31, 32

Jacobsen v. Pitman Moore, Inc., 573 F. Supp. 565 (D. Minn. 1983) 16

Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957) 15

Mitchell v. Gammil, 245 F.2d 207 (5th Cir. 1957) . . . 17

Nat'l Org. for Women v. Sperry Rand Corp., 457 F. Supp. 1338 (D. Conn. 1978) . . . 15

Shultz v. Hasam Realty Corp., 316 F. Supp. 1136 (S.D. Fla. 1970) 17

Tomchek-May v. Brown Co., 581 F. Supp. 1163 (E.D. Wisc. 1984) 16, 21, 27, 29

Wirtz v. Campus Chefs, Inc., 303 F. Supp. 1112 (N.D. Ga. 1968) 17

STATUTES

28 U.S.C. § 636 11

28 U.S.C. § 1254(1) 3

29 U.S.C. § 206(d) 4

29 U.S.C. § 206(d)(1) 14

29 U.S.C. §§ 201-291 4

CODES AND MISCELLANEOUS

29 CFR § 800.108 15

108 Cong. Rec. 14957
(Rep. Pubinski) 30

109 Cong. Rec. 9199
(Rep. Green) 30

109 Cong. Rec. 9212
(Rep. Donahue) 30

109 Cong. Rec. 9212
(Rep. Ryan) 30

F.R.C.P. 72 11

XXI Cong. Q. No. 24, p. 978
(June 14, 1983) 31

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1994

Kathleen S. Winther, for herself and all others similarly situated, Petitioner

vs.

City of Portland, Respondent

PETITION FOR WRIT OF CERTIORARI

to the United States Court of

Appeals for the Ninth Circuit

The petitioner respectfully prays that a Writ of Certiorari

issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered on July 13, 1994, which denied rehearing and upheld the Summary Judgment Motion granted in favor of the City of Portland on June 9, 1992.

OPINIONS BELOW

Summary judgment was granted in favor of the City of Portland (City) by the District Court on June 9, 1992. The opinion of the District Court was not reported. On April 6, 1994, the decision of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit. The opinion was not reported.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on April 6, 1994. Petitioner's Application for Rehearing and Suggestion for Rehearing En Banc was denied on July 13, 1994. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). This petition was filed on October 10, 1994, within ninety (90) days of the Ninth Circuit's Order denying a rehearing.

STATUTORY PROVISIONS INVOLVED

The applicable statutory materials are set out in the Appendix, at App. 1-5.

STATEMENT OF THE CASE

Proceedings in the District Court

Petitioner filed a complaint for violations of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) and the Fair Labor Standards Act, 29 U.S.C. §§ 201-291, on November 27, 1991. Petitioner brought the action as a representative of a class of persons pursuant to § 16(b) of the Fair Labor Standards Act.

Respondent City of Portland is a municipal corporation under Oregon law and is subject to federal and state law.

29 U.S.C. § 206(d) of the Equal Pay Act prohibits an employer from discriminating on the basis of sex within any establishment by

paying different wages to employees of opposite sexes for equal work on jobs that require equal skill, effort and responsibility, and which are performed under similar working conditions.

Petitioner was employed by the Bureau of Emergency Services (BOEC) of the City as an emergency communications operator. BOEC works in conjunction with the Fire Alarm Dispatch (FAD) of the Portland Fire Bureau, and the two entities together comprise the City's 911 Emergency Response System. All the employees at FAD are men, and the vast majority of employees at BOEC are women. The men at FAD earn six dollars per

hour more than the predominately women employees at BOEC.

BOEC and FAD work together to provide the public with the 911 emergency system. The 911 system provides fire, police, and medical dispatch services to members of the public in response to calls in emergency situations. BOEC and FAD each provide a part of the service, together comprising the City's 911 system.

BOEC and FAD were housed in two geographically separate facilities a few miles apart. Today, they are housed together. BOEC and FAD each provide integral parts of the same 911 Emergency Service, and neither has the

ability to function independently without the other. The two separate physical locations are linked by an extensive computer system which enables the 911 system to work.

The City controls and administers the operation of both the BOEC and FAD units. An individual wishing to be hired for a position at either Bureau must follow the City's hiring procedures. When a particular Bureau needs to hire an employee to fill a position, the City provides the Bureau with a list of candidates that have already successfully completed the screening and interviewing process.

The Bureau can then choose an employee to hire from the City promulgated list. Thus, the City has ultimate authority and control of hiring new employees.

After an employee has been hired by a Bureau, that Bureau then exercises some internal management control over the employee in limited respects. However, the Portland City Council and the Personnel Director still retain ultimate authority with regard to most management functions. Further, all personnel records are stored and maintained together by the City's Personnel Office.

Ultimate authority over wages lies with the Personnel Director of

the City. Although there are different collective bargaining agreements for BOEC and FAD, the City dictates the individual job classifications which give rise to the wages bargained for in the collective bargaining process.

Training regarding procedures and techniques for receiving 911 emergency calls are the same for both BOEC and FAD. Both entities work together, under Multnomah County ordinances and local and state administrative rules to provide the public with the dispatch of emergency units in time of crisis.

On March 5, 1992, the City filed a Motion for Summary Judgment

solely on the issue of whether BOEC and FAD constituted a single establishment under the Equal Pay Act. The Magistrate granted the City's Motion for Summary Judgement on April 27, 1992. The Magistrate, using a hybrid test, based on geographic and functional considerations, found that petitioner had failed to produce facts sufficient to indicate that the two Bureaus of the City were one establishment under the Equal Pay Act. Thus, the Magistrate found that Petitioner was unable to establish a violation of the Equal Pay Act. The Magistrate's Findings and Recommendations are set forth in the Appendix, at App. 6-27.

On May 6, 1992, Petitioner submitted an objection to the Magistrate's Findings and Recommendations pursuant to 28 U.S.C. § 636 and F.R.C.P. 72. After a review of the Magistrate's ruling, the District Court Judge adopted the Magistrate's Finding and Recommendations in its entirety, thereby granting the City's Motion for Summary Judgment on June 9, 1992. The Order of Dismissal was entered on June 9, 1992, and the Judgment was entered on June 15, 1992. The Judgment and Order are set forth in the Appendix, at App. 28-32. On June 25, 1992, Petitioner entered a Notice of Appeal of the Judge's

Order, which is set forth in the Appendix, at App. 33-34.

Proceedings in the Court of Appeals

On April 6, 1994, the Ninth Circuit Court of Appeals affirmed the District Court's dismissal. The Judgment is set forth in the Appendix, at App. 35-36. The Court issued a Memorandum, which is set forth in the Appendix, at App. 37-54. The Court, based on a hybrid approach which used both the functional and geographic tests, found that Petitioner had not presented evidence sufficient to create an issue of material fact as to whether City's two Bureaus were one establishment within the meaning of the Equal Pay Act.

By Order, dated June 7, 1994, the mandate in the case was recalled to allow Petitioner until June 21, 1994, to file a petition for rehearing. The Order is set forth in the Appendix, at App. 55-56. On June 20, 1994, Petitioner filed an application for Rehearing and Suggestion for Rehearing En Banc. By Order, on July 13, 1994 Petitioner's application for Rehearing and Suggestion for Rehearing En Banc was denied. The Order is set forth in the Appendix, at App. 57-58.

REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHICH TEST DEFINES AN ESTABLISHMENT UNDER THE EQUAL PAY ACT, THE FUNCTIONAL TEST, OR THE HYBRID TEST.

The Equal Pay Act prohibits an employer from wage discrimination on the basis of sex for employees who are employed in the same establishment and are performing equal work. 29 U.S.C. § 206(d)(1). Before the enactment of the Equal Pay Act, establishment was interpreted as "meaning a distinct, physical place of

business . . . ". A.H. Phillips Inc. v. Walling, 324 U.S. 490 (1945); Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957). The Department of Labor used the same definition after the Equal Pay Act was enacted. 29 CFR § 800.108. The early cases addressing the establishment issue all involved retail establishments, and thus were all private employers. Each court followed the same narrow geographical interpretation. See Nat'l Org. for Women v. Sperry Rand Corp., 457 F. Supp. 1338 (D. Conn. 1978); Gerlach V. Michigan Bell Tel. Co., 448 F.2d 1178 (E.D. Mich. 1978); Bartelt v. Berlitz Sch. of Languages of Am., 698 F.2d 1003

(9th Cir. 1983); Jacobsen v. Pitman Moore, Inc., 573 F. Supp. 565 (D. Minn. 1983).

When the Equal Pay Act was extended beyond retail operations to include public entities, it was recognized that the geographical interpretation would have a restrictive effect on the remedial purpose of the act. See Tomchek-May v. Brown Co., 581 F. Supp. 1163 (E.D. Wisc. 1984). The Fifth Circuit was the first to adopt a broader view of establishment which does not limit the establishment determination to physical location alone. See Brennan v. Goose Creek Consol. Indep. Sch. Dist., 519 F.2d 53 (5th Cir. 1975).

The Brennan court noted,

> [A]dministrative regulations recognize that there may be situations in which a single establishment could include operations at more than one physical location. Judicial construction of the word "establishment," as used in other section of the Fair Labor Standards Act, also recognizes that it may apply to operations at different physical locations.

Brennan at 56. The Court cited cases in which private entities with separate physical locations were found to be one establishment for purposes of the Equal Pay Act. See Mitchell v. Gammil, 245 F.2d 207 (5th Cir. 1957); See Wirtz v. Campus Chefs, Inc., 303 F. Supp. 1112 (N.D. Ga. 1968); See Shultz v. Hasam Realty Corp., 316 F. Supp. 1136 (S.D. Fla. 1970).

In cases involving government defendants, the courts have now expressly repudiated the geographical concept of establishment. Grumbine v. United States, 586 F. Supp. 1144 (D.C. Cir. 1984). The Grumbine court held that for purposes of public employment, establishment was not determined by geography, but depended on the degree to which the particular governmental entity had centralized its personnel administration. Grumbine at 1151. The court outlined the functional approach, which employed a three-part test to determine whether there was a single establishment when the work was performed at

different geographical locations. The court considered the degree of centralized control the employer had, the actual work performed by the different offices, and the position description under which the plaintiff operated. Id at 1151. The Court used the "standard of function rather than that of mere geography." Id at 1151.

The functional approach was further developed in AFSCME, AFL-CIO v. County of Nassau, 609 F.2d 695 (D.C. N.Y. 1985). The AFSCME court, citing Brennan and Grumbine, recognized the trend away from the geographical interpretation of establishment, and concluded that physically separate work places can

constitute a single establishment if there is a significant functional interrelationship between the work of the employees and the various locations. Id at 706.

One Ninth Circuit case addresses the establishment issue in reference to a private employer. See Foster v. Arcata Assoc. Inc., 772 F.2d 1453 (9th Cir. 1985). The Foster case had two physically separate offices, each hundreds of miles apart and operationally distinct. Each office was independently managed for different customers, and each office had different operational needs. In considering the geographical

location and functional interrelationship of the two offices, the Foster court found that there was not a single establishment for the purposes of the Equal Pay Act.

In a case similar to the instant case, Tomchek-May, defendant Brown County administered its personnel functions in a centralized manner. The court found that although there was supervision and input at departmental levels, wage control, job classifications, and other personnel functions were subject to the ultimate control of the county. Thus, the court held that the county as a whole, rather than the

individual departments, such as the highway department and the mental health center, were one establishment within the meaning of the Equal Pay Act. See also EEOC v. Maricopa County Comm. College Dist., 29 FEP Cases 383 (D. Az. 1982); Alexander v. Univ. of Michigan - Flint, 509 F. Supp. 627 (E.D. Mich. 1980).

In the instant case, BOEC and FAD comprise the 911 Emergency System for the entire Portland Metropolitan Area. Each unit serves slightly different functions, but neither unit can act independently to provide 911 emergency services. BOEC and FAD each rely on the other to provide

critical components that comprise the whole 911 emergency response system. BOEC and FAD are part of the same computer dispatch system. BOEC houses the main computer, and FAD has terminals which display identical information to that which BOEC receives. This single cohesive unit, although physically split into two locations, provides the complete 911 emergency service for the Portland Area.

Further, both BOEC and FAD are centrally administered through the City. While each agency hires individuals to fill positions within their respective Bureaus, the selection of candidates for the jobs is ultimately controlled and

determined by the City. Both BOEC and FAD have collective bargaining agreements, negotiated by the Employment Relations Team, under the direction of the same Personnel Director. The City sets job classifications, then the Bureau bargains for wage rates. Thus, while the wages for the BOEC and FAD dispatchers are bargained for, the classifications which give rise to the wages are delineated solely by the City.

Many other aspects of BOEC and FAD are centrally administered. Both entities have the same employee discipline procedures. Funding for both Bureaus comes from the City's discretionary fund. All

City personnel records are located and maintained at the same location. Thus, these actions are ultimately and centrally controlled by the City.

The issue presented to the Ninth Circuit in the instant case was whether summary judgment was appropriately granted in favor of the City. Petitioner showed that there was a genuine issue of material fact with respect to the establishment issue. If a strict geographical test alone is not determinative, the Ninth Circuit should have looked to the three functional factors outlined by the Grumbine court: the degree of centralized control the employer

had; the work performed by the separate locations; and the position description under which the plaintiff operated.

Here, Winther demonstrated that BOEC and FAD are controlled by the City as to hiring procedures, wage rates, personnel records, and administration of each of the entities. Further, the work performed in each Bureau is an integral facet of that performed in the other unit, and the employees of both units receive the same training to perform the job of emergency dispatcher.

The City disputes that BOEC and FAD together comprise one establishment under the meaning set

forth in the Equal Pay Act. However, Winther has demonstrated that under the test set forth in Tomchek-May, Grumbine, and AFSCME, there is an issue as to who has ultimate and centralized control over the Bureaus. Thus, because there is an issue as to who has ultimate control, there is an issue as to whether BOEC and FAD constitute an establishment under the Equal Pay Act.

The test employed by the Ninth Circuit was a hybrid test, considering geographical location and functional considerations. Other circuits, while rejecting the strictly geographical approach, now use either a strict functional

test, or the hybrid approach, which is a combination of the geographical approach and the functional approach.

The geographical test is not consistent with the remedial purposes of the Equal Pay Act. It allows cases to be decided on the physical location of two worksites, even when the physical location is of no significance to the wage levels of the comparable employees. The economy present in the two physical locations might be a factor dictating the wages of workers in those two physically separate places. But, this is indicative only of the circumstances in those two

locations, and not the physical location itself. If one views the physical location itself as the factor considered, then employers can manipulate their workforce between different locations and justifiably pay workers of equal status different wages. If an employer chose to, the employer could segregate the women employees in a different physical location then the male employees and justifiably pay them lower wages. This is possible under the geographical test as is the case here, and thus leaves the Equal Pay Act powerless to demand equal pay.

The proper test, as outlined in Grumbine, Tomchek-May, and

AFSCME, is the functional test. The functional test considers the work performed in both locations, the job descriptions of the employee, and the degree of centralized control over the locations. This is the test most consistent with the remedial purposes of the Equal Pay Act, which is to eliminate all wage discrimination based solely on sex, so that equal pay for equal work is the standard. See 109 Cong. Rec. 9199 (Rep. Green); 109 Cong. Rec. 9212 (Rep. Ryan); 108 Cong. Rec. 14957 (Rep. Pubinski); 109 Cong. Rec. 9212 (Rep. Donahue); and see the statement of President Kennedy on the occasion of the signing of

the Equal Pay Act, June 10, 1983, XXI Cong. Q. No. 24, p. 978 (June 14, 1983).

2. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER THE SAME TEST SHALL APPLY FOR BOTH PUBLIC AND PRIVATE EMPLOYERS.

The only case decided by the Ninth Circuit on this issue was for a private retail employer. See Foster. The test set forth by the District Court for the District of Columbia in Grumbine, sets forth the functional test when the employer is a public entity. Grumbine does not consider geographic location, but looks to

the functional interrelationship between the two locations.

Here, the employer is a public entity (The City of Portland) and the test set forth for public employers should have been used. As the Court in Grumbine recognized, the proper test for public employers is the strictly functional approach.

This case provides the Court with an ideal opportunity to decide which test is the correct test, the functional approach, or the hybrid approach which combines geographical and operational considerations. The issue of which test is correct is ripe for a decision as there is great conflict

among the Circuits. Further, this case presents a public rather than private employer, offering the Court the opportunity to determine whether the tests will be the same for public and private employers, or whether there will be different standards depending on the status of the employer.

CONCLUSION

For the foregoing reasons this Court should grant a Writ of Certiorari to review the decision below.

Dated, October 10, 1994

Respectfully submitted,

Brad P. Avakian
Counsel of Record
Attorney for Petitioner

APPENDIX

(d) Prohibition of sex discrimination.
(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, Than an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to

cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes].

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States.

(1) Notwithstanding the provisions of section 13 of this Act [29 USCS § 213] (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his

employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 USC 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 13 of this Act [29 USCS § 213] (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965 [41 USCS §§ 351-357], every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

EQUAL EMPLOYMENT OPPORTUNITY COMM.

§ 1620.9 Meaning of "establishment"

(a) Although not expressly defined in the FLSA, the term "establishment" had acquired a well settled meaning by the time of enactment of the Equal Pay Act. It refers to a distinct physical place of business rather than to an entire business or "enterprise" which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment.

(b) In unusual circumstances, two or more portions of a business enterprise, even though located in a single physical place of business, may constitute more than one establishment. For example, the facts might reveal that these portions of the enterprise are physically segregated, engaged in functionally separate operations, and have separate employees and maintain separate records. Conversely, unusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment;

employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions. Barring unusual circumstances, however, the term "establishment" will be applied as described in paragraph (a) of this section.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

FINDINGS AND RECOMMENDATION

JUBA, Magistrate Judge:

INTRODUCTION

This is a class action for damages for violation of the Equal Pay Act of 1963, 29 U.S.C. §

206(d).[1] Plaintiff Kathleen Winther brings this action for herself and all those similarly situated. Defendant City of Portland is a municipal corporation under Oregon law and is subject to federal and state law. This court has jurisdiction over plaintiff's federal law claim under 28 U.S.C. § 1331.

Section 206 (d) of the Equal Pay Act prohibits an employer from discriminating on the basis of sex within any establishment by paying different wages to employees of

---

[1] The Equal Pay Act was enacted in 1963 as an amendment to, and is part of, the Fair Labor Standards Act of 1938, 29 U.S.C. && 201-19.

opposite sexes for equal work on jobs that require equal skill, effort and responsibility, and which are performed under similar working conditions. Plaintiff is an emergency dispatcher employed by the Bureau of Emergency Communications ("BOEC"), a bureau of the City of Portland. Complaint, para. 4. In alleging a violation of 29 U.S.C. § 206(d), plaintiff compares her ages to those of fire dispatchers who are employed by the Portland Fire Bureau ("PFB"). Defendant contends that the BOEC and the PFB are separate establishments under 29 U.S.C. § 206(d), and, therefore, defendant is entitled to summary

judgment on plaintiff's claim.

ISSUE PRESENTED

The issue presented by defendant's motion is whether or not plaintiff's place of employment, the Bureau of Emergency Communications and the Fire Alarm Dispatch of the Portland Fire Bureau are a single establishment within the Equal Pay Act.

UNDISPUTED FACTS

Plaintiff is employed by the Bureau of Emergency Communications ("BOEC"), a bureau of the City of Portland, as an emergency communications operator. Plaintiff, like all BOEC emergency communications operators, works at the BOEC building located at 2690

S.E. 103rd Drive, Portland, Oregon 97266.

All fire dispatch services for the City of Portland are provided by fire fighter specialists/communications. These fire fighter specialist/communications are fully trained fire fighters with the Portland Fire Bureau ("PFB"). All PFB fire fighter specialists/communications work at the PFB's Fire Alarm Dispatch building ("FAD"), located at 911 N.E. 21st Street, Portland, Oregon 97232. There is no interchange of personnel performing dispatching services between the BOEC building and the FAD building. Their staffs

are hired independently of one another.

The BOEC and the PFB Fire Alarm Dispatch each have their own internal management administrative personnel and completely separate budgets. The bureaus have some separate standard operating guidelines and procedure, but they also have some that are in common.

The BOEC and the PFB also have different collective bargaining agreements negotiated by different unions with at least some different terms and conditions of employment. The employees of the two bureaus work different schedules and provide different services to the public.

STANDARDS

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. id. at 324. A scintilla of evidence, or evidence that is merely colorable or not

significantly probative, does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.3d 1539, 1542 (9th Cir.), cert. denied, 493 U.S. 809 (1989).

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Reasonable doubts about the existence of a factual issue should be resolved against the moving party. Id. at 631. The court must view the inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-631.

However, when the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required. California Architectural Bldg. Product v. Franciscan Ceramics, 818 F.2d 1466, 1470 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988). The Ninth Circuit has stated, "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." Id. at 1468.

DISCUSSION

A. "Establishment" under the Equal Pay Act

29 U.S.C. § 206(d) (1) prohibits an employer from engaging

in sex-based wage discrimination by paying different wages to employees of different sexes within any establishment for jobs that require substantially equal skill, effort and responsibility, and which are performed under similar working conditions.

The term "establishment" is not expressly defined in the Fair Labor Standards Act, 29 U.S.C. §§ 201-219; however, in pre-Equal Pay Act cases the Supreme Court construed establishment to refer to a "distinct physical place of business," not "an entire business or enterprise which may include several separate places of business." A.H. Phillips, Inc. v.

Walling, 324 U.S. 490, 496 (1945) (construing "retail establishment" exemption of the Fair Labors Standards Act, 29 U.S.C. § 213(a)(2)). This interpretation has been adopted for purposes of construing the Equal Pay Act. See Foster v. Arcata Associates. Inc., 722 F.2d 1453, 1464 (9th Cir. 1985), cert. den. 475 U.S. 1048 (1986).

Defendant urges the court to employ a strictly geographical approach to the definition of establishment. However, in recent years, the courts have recognized the practical problems inherent in such a rigid interpretation and have adopted a more functional approach. Courts not only look to

physical separation as a factor in determining whether employment facilities are a single establishment under the Equal Pay Act, but they also examine the amount and degree to which physically separate facilities interact. See e.g. Brennan v. Goose Creek Consolidated Independent School Dist., 519 F.2d 53 (5th Cir. 1975); AFSCME, AFL-CIO v. County of Nassau, 609 F.Supp. 695 (E.D.N.Y. 1985); Grumbine v. United States, 586 F.Supp. 1144 (D.C. Dist. Col. 1984); and Alexander v. University of Michigan-Flint, 509 F.Supp. 627 (E.D.Mich. 1980).

In considering the single

establishment issue, the Ninth Circuit has explained, "federal courts have consistently rejected the extension of the statutory establishment requirement to separate offices of an employer that are geographically and operationally distinct." Foster, 772 F.2d at 1464 (emphasis added). In determining that the plaintiff had failed to produce evidence that her place of employment and the comparison place of employment were a single establishment, the Foster court looked not only to geographic separation, but also the day-to-day contract performance, the fact that different customers were provided with different services, and the

fact that the locations had separate budgets and separate project managers. Id. at 1465. Among the cases cited favorably by the Foster court is one in which the court explained:

> Physical separation is a major factor. More important, however, is the amount and degree to which the physically separate places of business interact.

Alexander, 509 F.Supp. at 629 (internal citations omitted).

Plaintiff has conceded that the BOEC building and the PFB Fire Alarm Dispatch building are geographically distinct places of business. Therefore, the focus of this inquiry will be on whether the two locations are operationally

distinct.

B. Operationally Distinct

1. Interaction

Plaintiff first points to the interaction between the BOEC and the FAD which together comprise the 911 Emergency Communication System for the Portland Metropolitan area. "While each unit serves slightly different functions, neither one can act independent of the other in providing the totality of services the 911 system provides." Plaintiff's Response at 7. However, I agree with defendant that this assertion misses the point. The issue is not whether the BOEC and the FAD are part of the same "enterprise" but rather

whether they are operationally the same establishment. Furthermore, plaintiff mischaracterizes the communication between BOEC and FAD dispatchers as being "continuous" when an emergency arises. Response at 7. Defendant has provided evidence that ongoing communication via computer between FAD and BOEC only occurs in one of three types of emergencies, a medical emergency. See Wilson April 20th Affidavit, para. 3. If a police emergency occurs, BOEC does not notify FAD, and has not further involvement with it. Id.

Plaintiff also references a "highly advanced computer system which completely negates any

significance between the physical separation of the two units." Response at 8. However, defendant has submitted evidence that the terminals used for dispatching at FAD are not connected to the BOEC computer and are not CAD terminals. Exh. 1 to Wilson April 20th Affd. Id. The fact that units which perform different services are connected by computer telephone lines to allow communication between the two is not probative to establish that the units operate as a single establishment.

2. Administration

Emergency communications operators and fire fighter specialists/communications are not

hired by a central administrative unit. Emergency communications operators are hired by the BOEC, from a list of eligible candidates certified by the Portland Bureau of Personnel Services. Stein Affidavit, para. 7. Fire fighter specialists/communications are hired by the FAD directly from a pool comprised solely of all fully trained Portland Fire Bureau fire fighters. Wilson Affidavit, para. 10. There is no Bureau of Personnel Services involvement whatsoever in the selection of fire fighters for the position of fire fighter specialist/communications. **Id.**

The fact that the City of

Portland Personnel Manual applies to all classified employees including the FAD and BOEC dispatchers is not determinative of the establishment issue. Rather, courts look to the authority to hire, fire set wages, and assign employees to work locations. Alexander, 509 F.Supp. at 629. See also Goose Creek, 519 F.2d at 56-58. In the present case, no central administrative unit sets wages for both the FAD and BOEC dispatchers. Although the city does establish job classifications for the two groups, wages are separately bargained for by different unions which represent their respective groups. In

addition, no central administrative unit assigns the location of employees. All emergency communications operators employed by the BOEC are assigned to the BOEC facility; all fire fighter specialists/communications are assigned to the FAD facility. Stein Affd., para. 4; Wilson Affd., para 5. Employees of BOEC and FAD never interchange work locations. Stein Affd., para 6, Wilson Affd., para. 5.

Other relevant factors support the conclusion that the BOEC and FAD are separate establishments. For example, FAD is administered by staff Captain Dale Thomas of the PFB, whose line of supervision

extends up the Portland Fire Chief George Monogue, head of PFB. Wilson Affd., para. 2 & 3. By contrast, day-to-day administration at BOEC is handled by the Operations Manager, Paul Stein, who reports to the Manager of the BOEC. Stein Affd., para. 2 & 3. FAD is funded, and its personnel wages are paid, out of the budget of the PFB. Wilson Affd., para 9. BOEC has its own distinct budget, out of which the emergency communications operators are paid. Stein Affd., para 13.

After examining the totality of the factors presented, I conclude that plaintiff has failed to produce facts sufficient to

indicate that the BOEC and the FAD are a single establishment under the Equal Pay Act. Therefore, plaintiff cannot establish a violation of the Act by comparing her salary to that of a fire fighter specialist/communications employed at the FAD.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment (docket #10) should be granted.

Dated this 27th day of April, 1992.

/s/ George S. Juba
George S. Juba
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself
and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

JUDGMENT

Based on the record,
IT IS ORDERED AND ADJUDGED that
Plaintiff take nothing and the
action is dismissed.

Dated this 15th day of June, 1992.

DONALD M. CINNAMOND, CLERK
UNITED STATES DISTRICT COURT

By /s/ Donna D. Ausbie
Donna D. Ausbie, Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

ORDER

FRYE, Judge:

The Honorable George E. Jua, United States Magistrate Judge, filed Findings and Recommendation on April 27, 1992. Plaintiff filed timely objections to the Findings and Recommendation. When either party objects to any portion of a

magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate's report. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). The matter is before this court pursuant to 28 U.S.C. § 636(b)(1) (B) and Fed. R. Civ. P. 72(b).

This court has, therefore, given de novo review of the rulings of Magistrate Judge Juba. This court ADOPTS the Findings and Recommendations of Magistrate Judge Juba dated April 27, 1992 in its

entirety.

IT IS HEREBY ORDERED that defendant's motion for summary judgment (#10) is GRANTED.

DATED this 9 day of June, 1992.

/s/ Helen J. Frye
HELEN J. FRYE
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Kathleen S. Winther, for herself and all other similarly situated, plaintiff named above, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of United States District Judge Helen J. Frye,

entered on this action on June 9, 1992.

Dated this 25th day of June, 1992.

FRANCESCONI & ASSOCIATES, PC

/s/ Bradley P. Avakian
Bradley P. Avakian OSB No. 90198
of Attorneys for Plaintiff

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff - Appellant

v.

CITY OF PORTLAND

Defendant - Appellee

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It

is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 6, 1994.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 92-35590

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted
January 5, 1994
Portland, Oregon

Before: POOLE and TROTT, Circuit Judges, and KING, District Judge*

Kathleen Winther appeals the dismissal of her Equal Pay Act suit against the City of Portland. Winther, an emergency communications specialist in the Portland Bureau of Emergency Communications (BOEC), attempted to compare her wages to those of fire fighter specialists/communications int he Portland Fire Alarm Dispatch (FAD). The district court granted summary judgment against her for

---

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

failing to show that the BOEC and FAD are one "establishment" under the EPA. We have jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment, Jones v. Union Pc. R.R., 968, F.2d 937, 940 (9th Cir. 1992), and we affirm.

I.

The City of Portland contends that the district court erroneously applied an "establishment" test that looked to more than just the physical location of the entities sought to be compared. We find no error in the district court's selection of the proper test.

The EPA prohibits discrimination on the basis of sex in the payment of wages. 29 U.S.C. § 206(d)(1). However, its scope is limited to comparisons "within any establishment in which such employees are employed." Id. (emphasis added). The EPA does not itself define the term "establishment." Nor does the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., of which the EPA is a part.

At the time of the EPA's passage, the Supreme Court had defined "establishment" for FLSA purposes thusly: "Congress used the word 'establishment' as it is normally used in business and

government--as meaning a distinct physical place of business . . . ." A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 496 (1945) (footnote omitted); accord Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957). Subsequent courts have modified the Phillips definition in EPA cases, adding functional considerations, such as the centralization of administration, transfer patterns, and the extent of interaction. See e.g., Marshall v. Dallas Ind. School Dist., 605 F.2d 191, 194 (5th Cir. 1979) ; Forsberg v. Pacific Northwest Bell Telephone Co., 622 F. Supp. 1150, 1152 (D. Or. 1985), aff'd on other grounds, 840 F.2d 1409 (9th Cir.

1988); AFSCME v. County of Nassau, 609 F. Supp. 695, 705-06 (E.D.N.Y. 1985); Alexander v. University of Michigan-Flint, 509 F. Supp. 627, 629 (E.D. Mich. 1980); Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168, 1172 (E.D. Mich. 1978).

This case is governed by Foster v. Arcata Assocs., Inc., 772 F.2d 1453 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986), the only Ninth Circuit case to consider the meaning of "establishment" as used in the EPA. Portland argues that Foster adopts the "distinct physical place of business" test of Phillips, while the district court concluded that Foster involved a hybrid functional approach. We

agree with the district court.

Foster cites to both Phillips and later functional cases. See id. at 1464. It notes "(w)hen considering the single establishment issue, federal courts have consistently rejected the extension of the statutory establishment requirement to separate offices of an employer that are geographically and operationally distinct." Id. (emphasis added). The analysis Foster does to concluded that the offices at issue are separate establishments considers both physical and functional components. It acknowledges that the offices "were hundreds of miles apart and

operationally distinct." Had the Foster court been using a strict "distinct physical place of business" test, it could have stopped with the observation that the offices were separate. Instead, Foster goes on to consider factors such as the independence of the management, the different operational needs, the different functions it served, and the existence of separate budgets. Id. at 1465. Based on Foster, then, our analysis must look to the nature of the services provided and the degree of central administration, such as budgeting, hiring, and day-to-day management, as well as the extent of physical

separation. See id. We turn to an application of Foster to the facts of this case.

II

Winther contends that the district court erroneously granted summary judgment because she had raised in issue of material fact as to whether BOEC and FAD should be considered one establishment. The district court did not err.

A. Interaction in Performing Services

Winther concedes that employees never transfer between the BOEC and FAD. However, she presented an affidavit to the district court that shows the two

agencies do work together in a complementary fashion. Together, the BOEC and FAD dispatch all services needed in response to medical emergency 911 calls. In response, the city has introduced evidence that as to emergencies other than medical ones, the two entities work independently. The city's affidavit indicates that police emergencies are handles exclusively by the BOEC, while fire emergencies are routed to the FAD for exclusive handling. Winther has submitted no evidence regarding interaction during non-medical emergencies. Taken in the light most favorable to plaintiff, this evidence shows that BOEC and FAD

serve different functions by sometimes work together to provide their respective services. This evidence does not materially distinguish Winther's case from Foster, in which two offices of a military contractor provided different services to the military. Foster, 772 F.2d at 1465. This provision of complementary services is insufficient to make the BOEC and FAD a single establishment.

B. Physical Connection

Winther next contends that there is a dispute of material fact over whether the BOEC and FAD are physically separate. Winther does not dispute that the BOEC and FAD are located in different buildings

an unspecified number of blocks apart, but claims that such physical separation is immaterial in light of phone and computer links between the offices.

This argument is misconceived. "Physical separation" as used in Phillips and Foster is a common-sense notion that refers to whether offices are physically contiguous or not. See Phillips, 324 U.S. at 496 ("Congress used the word 'establishment' as it is normally used in business and government--as meaning a distinct physical place" (footnote omitted) (emphasis added)); cf. Shultz v. Corning Glass Works, 319 F. Supp. 1161, 1164 (W.D.N.Y. 1970) (concluding

that three factories constituted one establishment where the "share an office building, are located back to back, and are connected by passageways"), modified on other grounds, 474 F.2d 226 (2d Cir. 1973), aff'd, 417 U.S. 188 (1974). The FAD and BOEC are located in noncontiguous buildings, and as a matter of law, such separation is material. See Foster, 772 F.2d at 1464-65. Given this lack of contiguity, the presence or absence of phone lines or modem hookups, at least under existing law, is irrelevant.

C. Joint Administration

Finally, Winther asserts that the BOEC and FAD's joint

administration makes them one establishment. But Winther's proffered evidence regarding centralized administration shows centralization at only the most general level. Winther argues that ultimate wage authority rests with the personnel director because she establishes the job classifications that determine salaries, but concedes that wages are set through separate collective bargaining agreements. Winther claims financial interdependence because funding comes from the same ultimate source, the city's discretionary fund, but does not dispute that the BOEC and FAD have separate budgets.

Additionally, Portland underlines the fact that each department has independent management; Winther's only response is that the city has promulgated a supervisor's guide and may have expected it to be followed in all disciplinary matters. Portland introduced evidence that the hiring processes are completely separate, involving the independent judgment of those in the department; Winther concedes this, but claims that hires come from the same city-approved list. Portland alleges that training is separate and different; Winther alleges that some training is done by the same person.

Finally, Winther notes, without contradiction, that each department is subject to many of the same regulations. But Portland points out, also without contradiction, that there is no centralization of assignments or interchange of personnel between the departments.

Considered as a whole in the light most favorable to appellant, these facts do not suffice to raise any issue as to whether the BOEC and FAD are really on establishment under the EPA. As in Foster, the two entities have separate budges. As in Foster, the entities are run by independent management with independent decision making

authority over their staff. As in Foster, the entities serve different functions.

At best, Winther's affidavits show that the BOEC and the FAD share some things in common. However, the EPA limits comparisons to individual establishments, not enterprises. The connections Winther points to are of the sort that would be common to a corporation with several branch offices: some ultimate hiring and budgetary control, phone lines between offices, common policies that regulate certain aspects at each branch. But under a functional test like Foster's, such an arrangement creates several

establishments, not one. See Alexander v. University of Michigan-Flint, 509 F. Supp. 627, 628-29 (E.D. Mich 1980); Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168, 1172 (E.D. Mich. 1978). Winther's affidavits show centralized control only as to general matters, and do not create an issue of material fact over whether the BOEC and FAD are operationally distinct.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 92-35590

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

ORDER

Before: POOLE and TROTT, Circuit Judges, and KING, District Judge*

The mandate in this case is

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

hereby ordered RECALLED. Appellant shall have fourteen days from the date of this order in which to file a petition for rehearing.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 92-35590

Cv. No. 91-1232-JU

KATHLEEN S. WINTHER, for herself and all others similarly situated

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

ORDER

Before: POOLE and TROTT, Circuit Judges, and KING, District Judge**

The panel has voted to deny

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

appellant's petition for rehearing and to reject the suggestion for hearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc in rejected.